

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

On appeal her attorney asserts that the record establishes that OWCP erred in its August 15, 2007 decision because the evidence established that the employing establishment only had 32 hours of work for appellant each week and she was therefore entitled to 8 hours of wage-loss compensation beginning in 1999 and references a July 23, 2008 letter from the employing establishment.

FACTUAL HISTORY

On August 21, 1999 appellant, then a 42-year-old licensed practical nurse, filed a traumatic injury claim, alleging that she felt a sharp pain in her right shoulder after assisting a patient that day. On October 25, 1999 OWCP accepted that appellant sustained sprains to the shoulder, arm, wrist and hand, and she received intermittent compensation thereafter. On September 28, 1999 appellant was in a nonwork-related motor vehicle accident with diagnoses of cervical and dorsal sprain/strain. She returned to limited duty on November 4, 1999 and to full unrestricted duty effective December 1, 1999.

On September 25, 2006 appellant filed a recurrence claim. She stated that the right shoulder condition was ongoing, and that she was on medical restrictions, and was attending physical therapy one to two times a week. An employing establishment nurse manager indicated that appellant did not stop work and had been on modified duty with a lifting restriction of five to 10 pounds since the 1999 employment injury. In a response to OWCP development letters, appellant advised that she had been in pain since the August 21, 1999 employment injury. She related that she had been in two motor vehicle accidents since the employment injury, one in late 1999 when her vehicle was hit head-on, and a second in August 2004 when the seat belt caused additional soreness in her right shoulder. Appellant further stated that she dropped her work to four days a week in 1999 "due to this problem with medication an[d] workload." On January 30, 2007 OWCP accepted the additional conditions of right shoulder impingement syndrome and right shoulder capsulitis.

On February 23, 2007 appellant filed a Form CA-7, claim for compensation for the period December 8, 1999 to February 16, 2007 and submitted additional medical evidence.³ The

³ The medical evidence included numerous chiropractor reports dated from January 19, 2000 to May 13, 2003. An October 29, 1999 magnetic resonance imaging (MRI) scan of the right shoulder demonstrated focal tendinitis with possible partial tear. In reports dated March 2 and December 4, 2001, Dr. David Kalin, a family practitioner, diagnosed chronic right shoulder impingement syndrome due to the employment injury and chronic ligamentous strain due to the September 28, 1999 motor vehicle accident. In a September 13, 2001 report, Dr. Francisco Gomez, an orthopedic surgeon, provided examination findings. A December 4, 2001 MRI scan of the right shoulder demonstrated tendinosis of the right rotator cuff. In reports dated August 14 and September 30, 2002, Dr. Patrick Horan, a Board-certified orthopedic surgeon, diagnosed frozen shoulder. The physician advised that appellant could work eight hours a day with a restriction of no work above the shoulder with the left [sic] arm. On a November 29, 2006 disability slip, Dr. Gomez diagnosed right shoulder and cervical pain and advised that appellant could work with a 10-pound lifting restriction. Appellant also submitted evidence not relevant to the period of claimed intermittent compensation.

employing establishment indicated that appellant was working four days a week with a five-pound lifting restriction. The employing establishment provided attendance records showing that appellant took eight hours leave each pay period on a regular basis beginning on December 12, 1999.⁴

By decision dated August 15, 2007, OWCP denied appellant's claim for compensation for the period December 8, 1999 to February 16, 2007. It found that the medical evidence did not support that she was restricted to a four-day workweek.

By decision dated May 26, 2009, appellant was granted a schedule award for a 21 percent permanent impairment of the right upper extremity, for 65.52 weeks, to run from April 23, 2009 to July 25, 2010.⁵ On July 5, 2009 appellant advised that she worked part time as an office nurse in a clinic and submitted W-2 forms from 2007 and 2008 showing outside part-time employment. On September 28, 2009 she submitted a claim for compensation for intermittent compensation for the period November 7, 1999 to April 22, 2009. The employing establishment advised that appellant was working eight hours a day, four days a week. On March 1, 2010 OWCP informed appellant to follow the appeal rights enclosed with the August 15, 2007 decision.

On November 5, 2010 appellant, through her attorney, requested reconsideration. He argued that the employing establishment was only able to offer appellant 32 hours of work weekly within her restrictions. Appellant submitted additional medical evidence not relevant to the period of disability covered by the instant claim, *i.e.*, December 8, 1999 to February 16, 2007.

The employing establishment submitted a notice of personnel action, effective November 7, 1999, that indicated that appellant's status was changed to part-time at her request. A licensed practical nurse position description including an unidentified handwritten notation dated July 23, 2008 stated, "physical demand -- she has lifting restrictions of 0 to 10 per M.D."

By decision dated December 1, 2010, OWCP denied appellant's reconsideration request on the grounds that it was untimely filed and that she failed to establish clear evidence of error.

LEGAL PRECEDENT

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA. It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.⁷

⁴ This was a combination of sick and annual leave.

⁵ At her request, appellant received a lump-sum payment for the schedule award. She did not file an appeal with the Board of the May 26, 2009 schedule award decision.

⁶ 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000).

OWCP's procedures state that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations,⁸ if the claimant's application for review shows "clear evidence of error" on the part of OWCP. In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To show clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁰

OWCP procedures note that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹¹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.¹²

ANALYSIS

The Board finds that as, more than one year had elapsed from the date of issuance of the merit decision in this case on August 15, 2007, appellant's request for reconsideration on November 5, 2010, was untimely filed.¹³ Consequently, appellant must demonstrate clear evidence of error by OWCP in denying her claim for disability compensation.¹⁴

The Board also finds that appellant failed to establish clear evidence that the August 15, 2007 OWCP decision was in error. The merit issue in this case is whether appellant established

⁸ 20 C.F.R. § 10.607.

⁹ *Alberta Dukes*, 56 ECAB 247 (2005).

¹⁰ *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *James R. Mirra*, 56 ECAB 738 (2005).

¹² *Nancy Marcano*, 50 ECAB 110 (1998).

¹³ *Supra* note 6.

¹⁴ 20 C.F.R. § 10.607(b).

that she had intermittent disability for the period December 8, 1999 to February 16, 2007.¹⁵ In the only merit decision on this issue, by decision dated August 15, 2007, OWCP denied appellant's claim on the grounds that she submitted insufficient probative medical evidence to support that she was totally disabled for the period claimed due to the August 21, 1999 employment injury. With her untimely reconsideration request, appellant submitted additional medical evidence. None of the evidence, however, is relevant to the period of claimed disability adjudicated in the August 15, 2007 OWCP decision.

As to appellant's argument on reconsideration and with her appeal to the Board -- that the August 15, 2007 decision was in error because the employing establishment only offered appellant 32 hours of work each week, the record contains a notice of personnel action stating that, effective November 7, 1999, appellant's status was changed to part time at her request. While appellant argued on appeal that the form had to be worded that way, she submitted nothing to substantiate this claim. Her attorney also referenced a July 23, 2008 employing establishment letter. The record, however, does not contain a July 23, 2008 letter. The only document with that date is a position description with an unidentified notation listing physical restrictions.

Clear evidence of error is intended to represent a difficult standard and the argument and medical evidence provided here is not the type of positive, precise and explicit evidence which manifested on its face that OWCP committed an error.¹⁶ As the evidence and argument submitted are of insufficient probative value to *prima facie* shift the weight in favor of appellant and raise a substantial question as to the correctness of the August 15, 2007 OWCP decision, appellant has not established that OWCP committed error by its August 15, 2007 decision.¹⁷ The Board therefore finds that in accordance with its internal guidelines and with Board precedent, OWCP properly performed a limited review of the evidence and argument submitted by appellant with her November 5, 2010 reconsideration request to ascertain whether it demonstrated clear evidence of error in the August 15, 2007 decision and correctly determined that it did not, and thus denied appellant's untimely request for a merit reconsideration on that basis.¹⁸

The Board notes that OWCP has not adjudicated appellant's claim for intermittent compensation beginning on February 17, 2007 and continuing.

¹⁵ Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA. See 20 C.F.R. § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999). Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence. *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁶ *Id.*

¹⁷ *Nancy Marcano*, *supra* note 12.

¹⁸ 20 C.F.R. § 10.607(b); see *D.G.*, 59 ECAB 455 (2008).

CONCLUSION

The Board finds that, as appellant's November 5, 2010 reconsideration request was not timely filed and that she failed to establish clear evidence of error, OWCP properly denied a merit review of her claim by its December 1, 2010 decision.

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: March 22, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board